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Nos. 54, 55, 56, 57

In the Supreme Court of the United States

OCTOBER TERM, 1947

HARRY BLUMENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

LAWRENCE B. GOLDSMITH, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL S. WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ALBERT FEUERBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases—Continued

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No. 54

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No. 55

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OPINIONS BELOW

The opinion of the circuit court of appeals, originally concurred in by all three of the circuit court judges sitting (R. 482–498), is reported at 158 F. 2d 883. The denial of the petition for rehearing by two of those judges, and the dissenting opinion of the other judge (R. 499–504), are reported at 158 F. 2d 762.

JURISDICTION

The judgment of the circuit court of appeals was entered December 16, 1946 (R. 504–505). Petitions for rehearing were denied February 28, 1947 (R. 505). The petitions for writs of certiorari were filed March 26, 1947, and were granted May 5, 1947 (R. 507–508). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's finding that petitioners were engaged in a single conspiracy to sell liquor at over-ceiling prices.

2. Whether the trial court properly allowed the jury to consider against each petitioner acts performed by the others.

3. Whether there was sufficient proof of the *corpus delicti* to permit introduction in evidence of extrajudicial admissions by petitioners Goldsmith and Weiss.

4. Whether a conspiracy to violate the Emergency Price Control Act may be prosecuted under Section 37 of the Criminal Code.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 55–59.

STATEMENT OF FACTS

Petitioners, together with one Abel, were all convicted under an indictment returned against them in the United States District Court for the Northern District of California, charging a conspiracy to violate the Emergency Price Control Act by selling whiskey at over-ceiling prices (R. 3–6, 30–33). Blumenthal, Feigenbaum and Abel were sentenced to imprisonment for eight months and to pay a fine of $1,000; Goldsmith and Weiss to imprisonment for two months and to pay a fine of $1,000 (R. 47–56). On appeal the judgments were affirmed (R. 504–505), Judge Denman dissenting on petitions for rehearing on the ground that the evidence failed to establish a single conspiracy as charged in the indictment (R. 499–505).

The evidence for the Government may be summarized as follows:

Petitioner Goldsmith held a basic permit as a wholesale liquor dealer under the name of the Francisco Distributing Company, hereinafter called "Francisco" (R. 244–245). Weiss, who had formerly been Goldsmith's partner (R. 244),

was employed by Francisco (R. 252–253). None of the other defendants held a basic permit (R. 246).

On December 10, 1943, a carload of 2,076 cases of Old Mr. Boston Rocking Chair whiskey was shipped to Francisco through the Penn Midland Import Company of New Jersey (Gov. Ex. 7, R. 250). When it arrived on December 17, 1943, 1,426 cases were delivered directly from the car and 650 cases were stored in the warehouse of the San Francisco Warehouse Co. (R. 251–252, 255–256). The instructions regarding the unloading of the car were given to the warehouse by Weiss, representing Francisco (R. 252–253). A second carload of the same brand of whiskey consisting of 1964 cases was received by Francisco on December 31, 1943, and handled through the same warehouse (Gov. Ex. 8, R. 250; R. 258–259). Weiss also made arrangements with the warehouse for the handling of this carload (R. 258). Goldsmith directed the bank at which Francisco maintained its account to pay sight drafts for both carloads of whiskey (R. 267–268).

The wholesaler's ceiling price for the whiskey, calculated on the basis of purchase price, freight charges, state taxes, and permissible mark-up was $25.27 a case (R. 275–277). Francisco had made no sales of Old Mr. Boston Rocking Chair Whiskey in the period from March 1942 to December 1943 (R. 249).

Some time between December 3 and December

6, 1943, i. e., before the whiskey had arrived in San Francisco, the defendant Abel, who worked for a jeweler in Vallejo, California (R. 278, 284), offered to sell whiskey to a restaurant owner in Vallejo named Reinburg (R. 278–279). They "dickered about the price of it, and finally arrived at a price of $65.00 a case" (R. 279). Reinburg agreed to take 100 cases. About the 6th of December, Reinburg gave Abel a check for $2,450 to the order of Francisco with the understanding that the balance of the agreed price would be paid in cash (R. 279–280). Reinburg agreed to this sale because the manner in which it was to be handled enabled him to keep records of his purchases as required by state law (R. 285; see R. 325–326).[1] Subsequently, when Abel brought Reinburg Francisco's invoice for the whiskey, billed at $24.50 per case, Reinburg gave Abel the balance of the purchase price in cash (R. 279–280). Later in December, Reinburg purchased another 100 cases through Abel in the same fashion, paying $2,450 by check to the order of Francisco and the balance in cash to Abel, and receiving Francisco's invoice for the whiskey at $24.50 per case (R. 281).

Through Reinburg, another tavern owner, Giometti, purchased 50 cases of whiskey at the same price of $65 per case. Payment was made in

[1] See Sec. 24.4 of the California Alcoholic Beverage Control Act, 2 California, *General Laws* (Deering, 1944), Act 3796, Appendix, *infra*, p. 59.

the same fashion, by check to the order of Francisco at the rate of $24.50 per case and the balance in cash (R. 288–290). Subsequently, Giometti had a conversation with Abel who said that this sale had gone "through his hands" and that he could get more of the same brand at $60 per case (R. 290–291). Abel said that he took the cash given to him to the "big shot" in San Francisco (R. 291).

While Reinburg was dealing with Abel, on December 6 or 7, he drove Abel to a sports goods shop in the down town section of San Francisco around Third Street off Market Street (R. 282). On December 16 or 17 Reinburg again drove Abel to San Francisco, dropped him at the same place, and picked him up there about a half hour later (R. 283).

Petitioner Blumenthal arranged for sales of whiskey to several persons in the back room of the Sportorium, a sports goods shop on Third Street off Market in San Francisco (R. 353). About the 3rd or 4th of December, again before the whiskey had been received by Francisco, a tavern owner named Fingerhut talked with Blumenthal at the Sportorium (R. 362). Blumenthal said that he could sell him whiskey at $55 per case, that he did not know exactly when it would come in, but that he would get it the latter part of the month (R. 362–363). Fingerhut went back to the Sportorium a few days later and agreed to take 200 cases, 100 for himself and

100 for a man named Travis (R. 364). Blumenthal asked for and received $4,000 in cash, and said that a check would be required later (R. 364). On December 9, Fingerhut went back to the Sportorium with Travis (R. 365, 373). On this occasion he and Travis each gave Blumenthal a check for $2,000 to the order of Francisco and $1,050 in cash (R. 365, 367, 374–375). Subsequently, each of them paid the balance of $450 by checks to the order of Francisco (R. 365, 375). Blumenthal gave each of them a Francisco invoice for the whiskey which recorded a payment of $2,000 on account and a balance due of $450 (Gov. Ex. 58, R. 375; Gov. Ex. 52, R. 367). Two hundred cases of Old Mr. Boston Rocking Chair Whiskey, representing the purchases by Travis and Fingerhut, were delivered to Travis's warehouse (R. 365). Later in the month, Fingerhut received a telephone call asking whether he needed more whiskey (R. 366). He agreed with Blumenthal to take 25 cases and Travis agreed to take 75 cases at $55 per case (R. 366). Payment was made in the same fashion as previously, by check to Francisco at the rate of $24.50 per case, and the balance in cash (R. 365–366, 367–368, 376). This transaction was handled by Travis who received a Francisco invoice from Blumenthal at the Sportorium about the 3rd of January (R. 376).

Another purchaser from Blumenthal was a tavern owner in Santa Rosa named Lombardi (R. 353). About the 15th of December 1943, one

Minkler told Lombardi that there was a possibility of getting whiskey (R. 353). Minkler and Lombardi went to the Sportorium and Minkler went into the back room there (R. 354). When he returned he said, "they got in contact with somebody and the whiskey was O. K." (R. 354). A few days later Lombardi and Minkler saw Blumenthal in the back room of the Sportorium (R. 354). At that time, Lombardi gave Blumenthal $3,050 in cash (R. 354). A few days later, Lombardi received 100 cases of Old Mr. Boston Rocking Chair Whiskey and gave Minkler a check for $2,450 (R. 355, 356). Lombardi thus paid $55 per case for the whiskey. Lombardi received by mail Francisco's invoice for the liquor at $24.50 per case, with the notation "Salesman Weiss" on the document (Gov. Ex. 51, R. 355–356).

Petitioner Feigenbaum operated the Sunset Drug Store in San Francisco (R. 318, 336). About the 1st of December two tavern owners, Taylor and Humes, met a man known as "Little Joe," who said that he could get whiskey for them (R. 319–320, 332–333). Taylor gave "Little Joe" $500 as a deposit (R. 320, 333). On December 9, "Little Joe" took Taylor and Humes to the Sunset Drug Company and introduced them to Feigenbaum (R. 318, 320–321, 333). Feigenbaum told them that if they had not appeared they would have lost their deposit (R. 317–318, 334). Feigenbaum wanted Taylor to buy 200

cases of whiskey at $64 per case, and Taylor at first agreed to do so (R. 318, 335). Later, Taylor said that he might not be able to handle 200 cases, and Feigenbaum agreed to keep 100 cases, stating, however, that he would like to have it billed against Taylor's license (R. 318–319). At Feigenbaum's direction, Taylor's wife drew a check for $4,900 (i. e., 200 cases at $24.50 per case) to the order of Francisco, and Taylor also gave Feigenbaum $1,050 in cash (R. 319, 331). Feigenbaum told Taylor and Humes that the whiskey would be in about ten days later and would be sent by truck or freight (R. 335).

On December 23, Taylor again saw Feigenbaum and inquired about the whiskey (R. 321). Feigenbaum said it would be in shortly and that it would be shipped to Taylor (R. 321, 327). At that time, Feigenbaum told Taylor the brand name of the whiskey, Old Rocking Chair, and showed him a bottle (R. 322). Feigenbaum gave Taylor a check for $2,450 to cover the 100 cases Taylor had declined to take, and Taylor endorsed and returned the check to cover the cash payment due (R. 322). Taylor received by mail a Francisco invoice for the whiskey (R. 335).

Early in December, a tavern owner named Figone talked to a man at Francisco's office about the purchase of whiskey (R. 295–296). He understood the man's name to be Weiss but could not identify the man in the court room (R. 295, 299, 300). The man told him that the

whiskey was not in but would be received in a few days (R. 296, 297). Subsequently, Figone purchased 200 cases for himself and 75 cases for a friend from the man at Francisco (R. 296). At the direction of the man with whom he dealt, he drew a check for $4,900 to Francisco's order and added a sufficient sum in cash to bring the purchase price to $60 per case (R. 297–299). Figone's friend, Avila, paid for his 75 cases in the same fashion, by check to Francisco and the balance in cash (R. 300–301). He received a Francisco invoice for the liquor which showed the salesman as Weiss (R. 298–299).

A man who called himself Weiss or Wise and said he was from Francisco, called on one Cernusco in December 1943, and offered to sell him whiskey (R. 302). Cernusco could not identify the man in the court room (R. 302). Cernusco agreed to purchase whiskey for himself and two friends. He gave the Francisco representative checks to the order of Francisco in the sum of $2,000 each, drawn by himself and his two friends (R. 301–302, 303–304). In the early part of January, the Francisco representative drove Cernusco to Third Street in San Francisco, parked the car, and went across the street (R. 302). Cernusco could not say whether or not the man went into the Sportorium (R. 302). After he came back, the man said that the whiskey was in the San Francisco warehouse, and Cernusco checked to see that it was there (R. 304–305, 306).

The man gave Cernusco a Francisco invoice for the whiskey, and Cernusco gave him two checks to the order of Francisco for $450 each and $6,100 in cash (R. 303–304, 306). Cernusco's friends received Francisco invoices for the whiskey, Old Mr. Boston Rocking Chair, billed at $24.50 per case (R. 308–310).

An unidentified salesman approached a tavern owner named Vogel in San Francisco on December 6, 1943, and offered to sell him whiskey (R. 345–347). Vogel gave the salesman a check to the order of Francisco for $2,450 (R. 346–347). About two hours later the salesman came back with a Francisco invoice for the whiskey, and Vogel gave him $3,400 in cash (R. 346–347). Vogel subsequently received 100 cases of Old Mr. Boston Rocking Chair Whiskey (R. 347–348).

On December 3 or 4, 1943, an unidentified person approached a tavern owner named Duffy and told him he might be able to get liquor for him (R. 349–350). On December 7, this unidentified person told Duffy that he had some liquor lined up at $24.50 a case but that there would be a premium of $20 a case to be paid in cash (R. 350–351). On December 7, Duffy gave the man a check for $2,000 with the name of the payee omitted. The check was later filled in with the name of Francisco as payee (R. 348–349). On December 17, the man told Duffy that the whiskey was Rocking Chair Whiskey, and that it could

be picked up at the San Francisco Warehouse (R. 351–352). Duffy gave the man a check for $450 and $2,000 in cash (R. 352). He received a Francisco invoice by mail sometime later (R. 352).

Goldsmith and Weiss were questioned by agents of the Alcohol Tax Unit in January, May, and September 1944 (R. 380, 382, 385). When asked about the two carloads of Rocking Chair Whiskey, Goldsmith "said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, 'No'" (R. 382). Weiss refused to say who actually owned the whiskey. He said he knew Blumenthal, but refused to say whether Blumenthal was the owner (R. 385). At a time when both Weiss and Goldsmith were present, Weiss told the agent that Francisco had received $2 a case for clearing the whiskey through its books, and Goldsmith concurred in that statement. They both said they had not sold any of the whiskey, that it was sold by others, and that they generally received a check in payment for the whiskey in advance of the date they were required to take up sight drafts for the liquor (R. 381).[2] In one of the later interviews, Gold-

[2] The evidence as set forth above shows that Francisco received $24.50 a case for the liquor. It further shows that Francisco was required to pay $19.24 to the distiller, 81 cents for freight, and $1.92 for state taxes, a total of $21.97 (R. 277). The receipt of $24.50 a case thus gave Francisco a profit of $2.53, out of which they had to pay storage charges, so that the net profit was approximately the $2 a case that Goldsmith and Weiss admitted receiving.

smith said that he gave to Weiss half of the $2 per case that Francisco received for handling the whiskey (R. 383), and Weiss admitted receiving half of Francisco's commission (R. 385). These admissions were received in evidence only against the party making them (R. 399).

At the start of the trial, when the Government attempted to introduce in evidence Goldsmith's wholesaler's monthly report, counsel for various defendants objected to the introduction of the exhibit on the ground that no foundation had been laid and that the testimony was not binding on their clients (R. 246–248). Similar objections were raised as each new bit of proof was offered (R. 249, 251, 253). Before the trial had proceeded very far, while documentary proof in regard to the receipt of the carloads of whiskey was being offered by the Government, the trial judge stated that he thought it would save time and be fairer to the defendants if the evidence adduced by the Government be admitted at first only as to the particular defendant to whom it appeared to be pertinent at the time, reserving to the Government the right to move for the admission of such facts against all of the defendants whenever in the Government's opinion sufficient facts had been introduced to render the testimony admissible against the other defendants (R. 254–255). At the close of its case the Government moved to admit against all the defendants all the

759136—47——3

evidence it had presented (R. 390). Over objection by defense counsel (R. 390–398, 400–409), the court admitted against all the defendants all the testimony except the admissions by Weiss and Goldsmith (R. 398–399, 409). The judge informed the jury of his ruling (R. 417–418).

In his charge, the judge instructed the jury that in order to convict a defendant, they had to find that he joined the conspiracy charged in the indictment (R. 440–442). The judge also pointed out to the jury that defendants were not charged with the substantive offense of selling at above ceiling and instructed them that proof that a defendant sold at above ceiling would not in itself establish his guilt as a conspirator (R. 439, 441).

SUMMARY OF ARGUMENT

1. The basic question in this case is the sufficiency of the evidence to support the jury's finding that all the petitioners were engaged in a common enterprise to sell whiskey at over-ceiling prices. There is no claim that if the evidence disclosed several conspiracies, rather than a single one, the variance would not be prejudicial.

A. It is our position that all the relevant evidence clearly justified the jury in drawing the inference that the sales of whiskey here proved were consummated in accordance with a pre-arranged plan in which a number of people were involved. Before the whiskey was received in San Francisco, a number of salesmen, acting almost simul-

taneously, let it be known that they could obtain whiskey for tavern owners. Each of the salesmen knew that the transaction would be handled in such a manner as to give the sale the appearance of legitimacy; each of them knew the wholesaler (Francisco) through whom the sales would clear; each of them knew the price that would appear on the invoice, and each of them aranged for the payment of such price by check to the wholesaler, and payment of the balance in cash. The orders taken were in fact honored by the wholesaler. Despite the great demand for whiskey, the wholesaler invoiced the liquor at less than the ceiling price. The brand of whiskey sold had never before been handled by the wholesaler. All these facts together fully warrant the conclusion that a plan had been devised and arrangements made in advance for the sale of whiskey in such a manner as to give over-ceiling sales the appearance of legitimacy.

The sales proved were not separate ventures; they were part of an integrated scheme. The wholesaler was dependent on the salesmen to make sales; the salesmen were dependent on the wholesaler to give their sales the appearance of legitimacy. The wholesaler honored the orders of all the different salesmen and thus adopted the acts of all. The salesmen knew their sales were clearing through the wholesaler, and thus adopted the wholesaler's acts. In addition, each salesman

knew that the elaborate arrangements for clearing the whiskey were not devised merely to cover the comparatively small number of cases sold by him, and thus knew that the transactions in which he participated were not isolated occurrences but were part of a general enterprise. The evidence thus established a single, integrated scheme of which all the acts proved were component parts.

B. 1. In addition to the evidence detailed above, Goldsmith and Weiss admitted that they did not own the whiskey, that they allowed it to be cleared through Francisco at a profit to themselves, and that they knew it was sold by "others." The evidence therefore clearly established that these two partners had entered into an agreement with the owner of the whiskey. The question as to their guilt is whether the evidence justifies the inference that they knew that the whiskey which they had agreed to handle but did not own was being sold at over-ceiling prices.

Their actions must be judged in the light of the great demand for whiskey at the time. Since the owner was obviously not selling the whiskey without a profit to himself at such a time, Goldsmith and Weiss must have known that the owner was getting more than the $24.50 per case which Francisco received, and hence they must have known that the invoices for $24.50 were false. They also must have known that the owner was getting more than the ceiling price of $25.27,

since, if he had been content to sell at ceiling price, he would have had no reason to give his customers false invoices showing sales at $24.50. Goldsmith and Weiss thus knew that the invoices were false documents covering illegal transactions at above ceiling prices.

It is immaterial whether Goldsmith and Weiss did or did not know the exact identity of the other defendants who sold the liquor. They knew that the liquor was being sold by more than one person and they did in fact honor the orders which came to them from such persons. They thus adopted what was done by these others.

2. The complicity of petitioners Blumenthal and Feigenbaum is based on the evidence that each made sales of liquor at over-ceiling prices in the pattern established by the evidence, i. e., by taking a check to Francisco at the rate of $24.50 per case, giving a Francisco invoice for such price, and receiving the balance in cash. This evidence justifies the inference that they participated in the conspiracy.

The gist of the conspiracy here proved was the scheme to sell liquor to tavern owners at over-ceiling prices in an apparently legitimate fashion through the medium of Francisco. The evidence as to both Feigenbaum and Blumenthal shows that each of them knew that this whiskey was coming in, knew that it would be cleared through Francisco, knew that Francisco would receive

$24.50 per case. Each of them therefore knew of the pre-arranged plan, the conspiracy, between the owner of the whiskey and Francisco. Each of them knowingly adopted such plan and furthered it by making sales in accordance with such plan.

In addition, each knew that the plan contemplated transactions beyond the individual sales which each effected. Since they thus knew that others were also making sales in furtherance of the common scheme, they are properly held responsible for the acts of the others.

II. Since the evidence established a single conspiracy, the court properly admitted the evidence of the acts of each petitioner against the others.

The fact that the judge waited until the end of the trial to allow the evidence to be admitted against all the petitioners did not prejudice them. The judge could not know at the outset whether or not the circumstances testified to by government witnesses would or would not justify the jury in inferring the existence of a conspiracy. Petitioners were forewarned that, if sufficient evidence of such fact was presented, the evidence allowed in as to one defendant would be admitted against the others. Had any one of them desired to cross-examine any witness not directly implicating him, he could, and upon occasion several did, cross-examine a witness whose testimony was not originally admitted against the particular defendant.

III. The evidence, other than the admissions by Goldsmith and Weiss, justifies the conclusion that the acts proved were part of a prearranged plan involving the informed and interested cooperation of more than one person to sell liquor at overceiling prices. There was thus sufficient proof of a corrupt agreement, the *corpus delicti* of the crime, to justify admission of the extrajudicial statements made by these two petitioners. The identity of the perpetrator of the crime is not part of the *corpus delicti*. *United States* v. *Di Orio*, 150 F. 2d 938, 939 (C. C. A. 3), certiorari denied, 326 U. S. 771.

IV. The prosecution for conspiracy to sell at overceiling prices was properly brought under Section 37 of the Criminal Code rather than Sections 4 (a) and 205 (b) of the Emergency Price Control Act. The word "agree" as used in Section 4 (a) of the Emergency Price Control Act, making it unlawful to "offer, solicit, attempt, or agree" to sell at overceiling prices is manifestly used in the sense of promise, rather than in the sense of concerted action. The amendment of Section 204 (e) to provide for stays of criminal prosecutions under Section 37 of the Criminal Code pending review by the Emergency Court of Appeals shows that Congress did not intend to repeal Section 37 in relation to conspiracies to violate the price control act.

ARGUMENT

I

THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT THERE WAS A SINGLE CONSPIRACY IN WHICH ALL PETITIONERS PARTICIPATED

The basic question in this case is the sufficiency of the evidence to support the jury's finding that all the petitioners were engaged in a common enterprise to sell whiskey at over-ceiling prices. The Government does not contend that if the proof showed several conspiracies, as the dissenting judge thought, the variance would not be prejudicial. The indictment charged a single conspiracy. The judge's ruling that the evidence as to the acts of one defendant could be considered against the others shows that he believed the evidence could be found to establish a single conspiracy. The case was submitted to the jury on the basis of a single conspiracy. The jury thus found that the evidence established a single conspiracy which all the petitioners joined, and a majority of the circuit court of appeals was convinced that the evidence supported that finding. We submit that this conclusion is correct.

We shall consider first the question of the sufficiency of the evidence to establish the existence of a single conspiracy, then the sufficiency of the evidence to show participation in that conspiracy by each of the individual petitioners, and finally the function of this Court in relation to such evidence.

A. *The sufficiency of the evidence to establish a conspiracy.*—In essence, the factual situation presented by the evidence in this case is as follows:

Some weeks before whiskey arrives at a wholesaler's place of business, at a time when the demand for whiskey is very great, a number of persons, acting almost simultaneously, let it be known that they can obtain whiskey for tavern owners. Some of these persons are not regularly engaged in the business of selling liquor. All these salesmen know that the transaction can be handled in a manner which will give it the appearance of a legitimate purchase from a wholesaler—a factor of great importance to the tavern owners, since it enables them to comply with the record-keeping requirement of state law. All the salesmen know the name of the wholesaler through whom the sales will clear. All of them know the price that will appear on the wholesaler's invoice, a price somewhat less than the wholesaler's legitimate selling price. All of them make arrangements for the payment of that price by check to the wholesaler and for the receipt of an additional sum in cash. When the first carload of whiskey arrives, a substantial portion thereof is immediately delivered in accordance with the arrangements made by the salesmen. Such deliveries are made in accordance with directions given to the warehouse by the wholesaler's representative. The

brand of whiskey sold is one never before handled by the wholesaler. Despite the great demand, the wholesaler is willing to sell at less than ceiling price, and he disposes of two carloads of whiskey at such price. The question here is whether a jury is justified in finding that these separate facts dovetail too neatly to be the result of mere chance, and that the whole pattern of all the evidence justifies the conclusion that some person or some group of persons planned and made arrangements for these transactions in advance.

We submit that the evidence here clearly establishes a plan even though the identity of the planners may be in doubt. Someone had to make arrangements to get the whiskey to San Francisco; someone had to make arrangements to have it clear through Francisco, the wholesaler; someone had to fix Francisco's price; someone had to tell the salesmen that the whiskey was coming in, that Francisco would honor their orders at less than ceiling prices, and would give them invoices at such prices; someone had to see that the orders taken were transmitted to Francisco—someone had to, and did, arrange all this before the whiskey first arrived in San Francisco. It is to be noted that none of the identified salesmen were regularly engaged in the business of selling liquor. Feigenbaum was a druggist, Abel worked for a jeweler, and Blu-

menthal apparently operated the Sportorium. They were thus not in a position where knowledge of the incoming shipment would come to them in the normal course of their activities. That knowledge had to be conveyed to them by someone. The jury was therefore fully justified in finding that there was a plan, a carefully worked out plan, to get whiskey to tavern owners at over-ceiling prices in a manner having the appearance of legitimacy.

Furthermore, the evidence justifies the inference that each person participating in that plan knew that he was merely part of a larger enterprise which necessarily involved the informed and interested cooperation of others.[3] The wholesalers, who handled two carloads of whiskey and honored orders obtained by a number of different salesmen, must have been aware that a number of persons were engaged in selling the whiskey. Each salesman, who knew of the arrangements by which the liquor was to clear through the wholesaler, must have been aware that those elaborate arrangements were not made for the purpose of selling the two or three hundred cases that each of them sold. Each was therefore aware that particular transactions were not isolated occurrences but part of a single integrated scheme. Hence, when each of them knowingly

[3] We discuss this point in more detail at pp. 34–36, *infra*, in considering the liability of petitioners Goldsmith and Weiss.

joined and furthered that plan in one way or another, each of them became liable for the acts of the others.

The pattern here is not the same as that before this Court in *Kotteakos* v. *United States*, 328 U. S. 750, 755, of separate spokes meeting at a common center, "without the rim of the wheel to enclose the spokes." The pattern here is that of a number of players directed by a guiding hand pursuant to a preconceived plan in which each knows that he is playing but a part—a wholly different situation. In the Government's brief in the *Kotteakos* case, when we conceded the existence of separate conspiracies on the basis of the facts there proved, we distinguished the situation there presented from others in which the courts had held that a single conspiracy of many component parts had been established. (See Gov. Br. Nos. 457 and 458, O. T. 1945, pp. 21–22.) As we there pointed out, the courts have held that where a person joins an enterprise which he knows requires participation of others for its success, he may properly be held liable for the acts of the others, although he is unaware of their identity, or even of the exact nature of their contribution to the common cause. Thus, in cases involving liquor or narcotics rings, it has been held that different groups, sometimes operating in scattered parts of the country, were properly joined under one conspiracy charge, since all were aware that they were part of a larger enterprise

and that their stake in the venture was dependent upon the success of other groups. *United States* v. *Bruno*, 105 F. 2d 921 (C. C. A. 2), reversed on other grounds, 308 U. S. 287; *United States* v. *Feinberg*, 123 F. 2d 425 (C. C. A. 7), certiorari denied, 315 U. S. 801; *Chadwick* v. *United States*, 117 F. 2d 902 (C. C. A. 5), certiorari denied, 313 U. S. 585. See also *Martin* v. *United States*, 100 F. 2d 490, 495 (C. C. A. 10), certiorari denied, 306 U. S. 649, involving a nation-wide plan to violate the Motor Carrier Act. Also, one central figure or one central group may be sufficient to bind many separate individuals together into one conspiracy under certain circumstances, as, for example, when the central group dominates the enterprise, and the lesser members know that they are merely a small part of a greater plan. See *United States* v. *New York Great Atlantic and Pacific Tea Co.*, 137 F. 2d 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver* v. *United States*, 121 F. 2d 245, 248 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Silkworth* v. *United States*, 10 F. 2d 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664.

The situation here is governed by the principles enunciated in those cases. Here there was both domination and interdependence. Some person or group of persons planned the scheme and made the arrangements. In addition, each group of defendants was dependent on the other. Francisco would not have received money for handling

the whiskey unless the whiskey was sold to tavern owners. The salesmen could not sell the whiskey unless they knew that the whiskey was coming in, and that it was being handled by a legitimate wholesaler in order to give the sale the appearance of conformity with the requirements of state law. In addition, as we have shown, each of them knew that he was a part of a single larger venture extending beyond the immediate transactions in which he personally was involved. Each thus knowingly furthered the common enterprise by which the whiskey was received in San Francisco and sold to tavern owners at illegal prices with the trappings of legality.

Petitioners and the dissenting judge both err in assuming that the mere fact that the evidence does not show that petitioners knew each other's identity is sufficient to fit this case into the *Kotteakos* pattern. Nothing in the *Kotteakos* decision changes the well established rule of conspiracy law that one may be held liable as a co-conspirator although he does not know the full scope of the conspiracy and does not participate in all its acts. *United States* v. *Valenti*, 134 F. 2d 362, 365 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Lefco* v. *United States*, 74 F. 2d 66 (C. C. A. 3); *Jezewski* v. *United States*, 13 F. 2d 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; *Allen* v. *United States*, 4 F. 2d 688 (C. C. A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U. S. 597; *Marino* v. *United States*,

91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Martin* v. *United States*, 100 F. 2d 490, 496 (C. C. A. 10), certiorari denied, 306 U. S. 649. It is enough that there is an integrated scheme to accomplish an illegal purpose, and that each member knows that he is aiding the illegal venture in which others are involved. See *Interstate Circuit* v. *United States*, 306 U. S. 208, 226–227.

It is, of course, true that the existence of the conspiracy was not the subject of direct testimony but had to be inferred from all the circumstances proved. But the mere fact that a conspiracy must be inferred from circumstances does not render the evidence insufficient. As this Court pointed out in *Direct Sales Co.* v. *United States*, 319 U. S. 703, 714, proof of conspiracy "by the very nature of the crime, must be circumstantial and therefore inferential to an extent varying with the conditions under which the crime may be committed." "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U. S. 60, 80.

Petitioners are apparently under the impression that overt acts by the defendants themselves cannot be considered in determining the existence of a conspiracy. The theory of all is articulated in instructions Nos. 27–29 sought by petitioner

Feigenbaum (R. 458–459), the omission of which from the judge's charge, he assigns as error (Pet. 53–56). Petitioners are clearly under a misapprehension. Any relevant evidence, including the acts of defendants (other than evidence such as confessions admissible against one party alone) may properly be considered by the jury in determining the existence of an underlying purpose or plan. The Circuit Court of Appeals for the Seventh Circuit has thus expressed the well-established rule in *United States* v. *Holt*, 108 F. 2d 365, 368–369 (C. C. A. 7), certiorari denied, 309 U. S. 672:

> True it is, that if the evidence is as consistent with the innocence of the appellant as with his guilt, no conviction can be had. It is equally true that overt acts of the parties may be considered with other evidence and attending circumstances in determining whether a conspiracy exists, and where the overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged. * * *

See also *American Tobacco Co.* v. *United States*, 328 U. S. 781, 789; *McDonald* v. *United States*, 133 F. 2d 23, 24 (App. D. C.); *Rich* v. *United States*, 62 F. 2d 638, 640 (C. C. A. 1), certiorari denied, 289 U. S. 735; *Pastrano* v. *United States*, 127 F. 2d 43, 44 (C. C. A. 4); *Davidson* v. *United*

States, 274 Fed. 285, 287 (C. C. A. 6); *Safarik* v. *United States,* 62 F. 2d 892, 896 (C. C. A. 8); *Marx* v. *United States,* 86 F. 2d 245, 250 (C. C. A. 8); *Garhart* v. *United States,* 157 F. 2d 777, 781 (C. C. A. 10).

Petitioners are confused by the rule that, before a jury can impute the acts of one conspirator to the others, the jury must first find by independent evidence that a particular defendant has joined the conspiracy. *Glasser* v. *United States,* 315 U. S. 60, 74. That rule, however, has reference, not to the determination of the existence of a conspiracy, but to the responsibility of a particular defendant as a conspirator. The jury must first determine from all the relevant evidence, including the overt acts of the parties, whether or not an agreement, an underlying plan, has been shown. Once that fact has been found, the jury must then determine whether the particular defendant was or was not a member of that conspiracy. To make this secondary determination, it can under the rule enunciated in the *Glasser* case, *supra,* consider only evidence directly relating to that particular individual, although, once a conspiracy has been shown, slight evidence is sufficient to connect a particular defendant therewith. *Phelps* v. *United States,* 160 F. 2d 858, 867–868 (C. C. A. 8); *Meyers* v. *United States,* 94 F. 2d 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx* v. *United States,* 86 F. 2d 245, 250 (C. C. A.

8); *Galatas* v. *United States*, 80 F. 2d 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711. Then, having found that a particular defendant has joined the conspiracy, it may impute to each member of the conspiracy the acts of all the other conspirators in furtherance of the conspiracy, *Pinkerton* v. *United States*, 328 U. S. 640, and thus determine whether guilt has been proved beyond a reasonable doubt.

Proving a conspiracy by the acts of the defendants is not proving a conspiracy by hearsay. The acts testified to by the various witnesses are facts proved in the same manner as any other facts, and if those facts justify the inference that there was an agreement, they constitute adequate proof of the crime. We do not have here the situation before this Court in the *Glasser* case where proof of the membership in the conspiracy of one individual depends upon statements by others that such person is a member. *Fiswick* v. *United States*, 329 U. S. 211, holding that confessions made after termination of the conspiracy are inadmissible against co-defendants is wholly inapplicable. Here the proof admitted against all related to acts, not declarations or admissions, and the jury was merely allowed to deduce that the acts proved were performed in furtherance of a common design.

B. *The sufficiency of the evidence of participation by each of petitioners.*

Goldsmith and Weiss.—Every one of the sales to which Government witnesses testified cleared

through Francisco, i. e., Francisco honored the orders obtained by Abel, Feigenbaum, Blumenthal, and the unidentified persons mentioned in the Government's testimony. In every such case, Francisco received slightly less than the ceiling price for the whiskey and gave an invoice for the price it received. Among the orders honored were orders obtained before the whiskey had arrived in San Francisco. The brand of whiskey sold had never before been handled by Francisco. Goldsmith and Weiss represented Francisco. Goldsmith was the owner and gave the orders for payment of the sight drafts for the liquor. Weiss was a former partner and employee, and gave orders to the warehouse for the transfer of the liquor to the tavern owners.

It is against this background that the admissions by Weiss and Goldsmith must be considered.[4] They admitted that they did not own the whiskey, that they allowed it to be cleared through Francisco at a profit to themselves, and that they knew it was sold by "others," i. e., more than one. Even the dissenting judge below conceded that these admissions, coupled with the other evidence in the case, proved an agreement between Goldsmith and Weiss on the one hand and the unknown owner of the whiskey on the other (R. 503). As to these defendants, his point,

[4] We discuss, *infra*, pp. 48–50, the sufficiency of the proof of the *corpus delicti* to support the admission of these statements.

which these petitioners have adopted here, is that the evidence is insufficient to show that the agreement was for the purpose of disposing of the whiskey at overceiling prices, rather than for some other purpose.

As to Goldsmith and Weiss, therefore, the real question is, not whether the evidence is sufficient to show that they joined a conspiracy, but whether the evidence is sufficient to justify the jury in inferring that they knew that the conspiracy which they joined was one to sell whiskey at overceiling prices. In other words, the basic question as to them is whether the evidence is sufficient to support the inference that they knew that the whiskey, which they did not own but which they had agreed to handle, was being sold at overceiling prices.

We submit that the evidence was clearly sufficient to justify that inference. The acts of Goldsmith and Weiss must be judged in the light of the times in which they acted. The great demand for whiskey in December of 1943, and the willingness of tavern owners to pay black market prices therefor was a matter of common knowledge, amply developed by the testimony of the government witnesses (see e. g., R. 285, 297). Goldsmith and Weiss knew from the orders they received, even before the whiskey arrived in San Francisco, that it was being transferred to tavern owners. They must have known the requirements of the California laws as to the keeping of

records. The evidence further shows that Francisco was required to pay $19.24 to the distiller, $0.81 for freight, and $1.92 for state taxes, a total of $21.97 (R. 277). The receipt of $24.50 per case gave Francisco a profit of $2.53, out of which they had to pay storage charges, so that their net profit was approximately the $2.00 per case that Goldsmith and Weiss admitted receiving. Obviously the jury was warranted in inferring that Goldsmith and Weiss knew that the owner, whose identity was doubtless known to them if not to the Government, was not distributing the whiskey to tavern owners without a profit to himself and that he was therefore getting more than $24.50 per case. He was either content with the small difference between $24.50 per case and the ceiling price of $25.27, a profit of 77¢ per case, or he was selling at over-ceiling prices. The evidence shows, however, that Goldsmith and Weiss must have known that the owner was getting more than $25.27 per case. They knew that the tavern owners were getting invoices showing the purchase price as $24.50. If such tavern keepers were really paying only the legitimate ceiling price, what reason would they have for accepting false invoices showing a lesser price than they paid?

The evidence shows that most of the tavern owners met the requirements of the California law (App., *supra*, p. 59) by keeping the original invoices (R. 285, 289, 298, 335, 356, 375). It is a justifiable, an almost inescapable, inference from the evidence

that Goldsmith and Weiss knew that the unknown owner was getting much more than $24.50 per case, and that the invoices at $24.50 per case were false documents used to give the color of legality to illegal transactions.[5] Under these circumstances, we submit that the jury was justified in concluding that when Weiss and Goldsmith made arrangements with the owner to clear his whiskey to tavern owners they must have known that the whole purpose of the transaction was to give black market sales the appearance of legitimacy. And if they knew that much, they knew enough to render them liable to prosecution for conspiracy.

It is immaterial whether Goldsmith and Weiss did or did not know the exact identity of the other

[5] Goldsmith and Weiss (G. Br. 3–4; Pet. 31–32) allude to the fact that the Government's proof related to only 1,575 of the total shipment of 4,040 cases. However, the mere fact that the Government did not call every purchaser does not mean that the other sales were proper. Any number of reasons might account for the failure to call other witnesses. Perhaps the prosecutor thought the evidence would be cumulative; perhaps the witnesses refused to incriminate themselves; perhaps some of them could not be found. Goldsmith and Weiss admitted that they sold none of the whiskey themselves. The documentary evidence (Gov. Exs. 10, 11, 13, and 14, R. 257, 259, 262) shows that all of it was invoiced at $24.50 per case. The inference therefore is that all was sold according to the usual pattern. The testimony of the Government witness Lombardi shows that one purchaser who did not testify, Minkler, had purchased at black market prices (Cf. R. 354–355, with Gov. Ex. 13, R. 259, showing invoice to Minkler) but had moved to New Mexico before the trial (R. 356). The Government's proof did show black market sales of a substantial portion, more than a third, of the two carloads.

defendants who sold the liquor.[6] They knew that the liquor was being sold by "others," more than one person. Whether they had agreed in advance with the unknown owner to honor the orders given to them by particular individuals, or whether they had agreed generally to accept such orders as were transmitted to them, no matter how obtained, the evidence indisputably establishes that they did in fact honor the orders of Blumenthal, Feigenbaum and Abel, and several unidentified persons. Whatever the relationship between the salesmen and the unknown owner of the whiskey, so far as Goldsmith and Weiss were concerned they were carrying out their arrangement with him to transfer the whiskey to the purchasers obtained in one fashion or another. And since Goldsmith and Weiss did know that more than one seller was involved, since they did honor the orders of their co-defendants, and since, as we have shown, they must have known that these were black market sales, they adopted what was done by these co-defendants in selling the liquor. They either knew, or they did not care, how the orders were secured. They cannot now disclaim responsibility on the theory that they did not know the exact details by which their basic arrangement with the owner of the whiskey was carried into effect.

This Court has held that, in order to hold a person liable as a co-conspirator, it is not neces-

[6] By their own admissions they did know Blumenthal.

sary that the parties agree in advance on the exact details by which the unlawful object is to be effected. In *Frohwerk* v. *United States*, 249 U. S. 204, 209, Mr. Justice Holmes said:

> * * * a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose.

A guilty person cannot "avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him." *Russell* v. *Post*, 138 U. S. 425, 431. If Goldsmith and Weiss knew that the orders they were filling were black-market orders, and we think it is clear that they did, they are in no position to claim unfairness because they were tried with the persons who obtained such orders. They operated with a "ring" and were responsible for the actions of the "ring."

The doctrine of *United States* v. *Falcone*, 311 U. S. 205, cited by petitioner Goldsmith (Br. 5; Pet. 27–28) does not aid these petitioners. In the first place, the *Falcone* decision turned on the fact that there was insufficient evidence to show that the seller knew that the buyer was conspiring with others. Here Goldsmith and Weiss, by their own admissions, did know that the whiskey was being sold by more than one person. Furthermore, the arrangements between Goldsmith and Weiss and

the unknown owner of the whiskey were not in the same category as a simple act of sale which could be transacted without prearrangement. Here there had to be arrangements made before the whiskey was received by Francisco, a course of procedure set, and a price fixed. Moreover, the interest of Francisco did not cease when the arrangements were made; so long as there was liquor to be sold, Francisco had a stake in the venture. As even the dissenting judge below conceded (R. 503), this evidence clearly showed an agreement. And since, as we have shown, the evidence fully justifies the inference that the agreement contemplated the sale of liquor at over-ceiling prices, it establishes the conspiracy charged in the indictment.

The mere fact that, on the surface, Goldsmith and Weiss performed no illegal act is not sufficient to absolve them from guilt as co-conspirators. Their innocent appearing actions were the crux of the conspiracy here proved, since the color of legitimacy was an essential part of the plan to dispose of the liquor to tavern owners at over-ceiling prices. As we have shown, the jury was justified in inferring that these two petitioners knowingly participated in that plan. The jury was therefore justified in finding them guilty of conspiracy to sell liquor at black-market prices. In *Direct Sales Co.* v. *United States*, 319 U. S. 703, each individual sale of narcotics by the defendant company complied

with all requirements of federal law and was not illegal on the surface. This Court nevertheless found that the company had been properly convicted of conspiracy with the buyer to violate the narcotic laws because of the company's "informed and interested cooperation" in the buyer's illegal purpose. The same "informed and interested cooperation," including a "stake in the venture," was proved here.

Blumenthal and Feigenbaum.—Although there is some evidence, such as the statement by Blumenthal that he was getting in liquor and the centering of activities at the Sportorium where Blumenthal did business, that Blumenthal may have had a greater interest in the whole venture than that of a mere salesman, his liability as a conspirator, as well as that of Feigenbaum, depends on the evidence as to each of them that each made sales of liquor to tavern owners at over-ceiling prices in the usual pattern established by the evidence, i. e., by taking a check

[7] It should be noted that the very fact that Francisco's actions were not illegal on their face justifies the bringing of the conspiracy charge here. The essential crime by Goldsmith and Weiss was the crime of conspiracy, and, if tried for the substantive offense, their liability would depend on application of the rules of conspiracy law to them under the principles enunciated by this Court in *Pinkerton* v. *United States*, 328 U. S. 640. Since, therefore, a conspiracy trial was necessary to reach these individuals, and since proof of the conspiracy did in part rest on the acts of the other defendants, there is a practical, as well as a legal, justification for the joint trial here.

to Francisco at the rate of $24.50 per case, giving a Francisco invoice at such price, and receiving the balance in cash. Such evidence in and of itself is sufficient to support the jury's finding that these two petitioners joined and furthered the conspiracy charged and proved.

The fundamental error in the opinion of the dissenting judge and the argument of these petitioners is their ignoring of the essential interdependence of the activities of all who were accused. The plan here was not merely to sell liquor at over-ceiling prices; it was a plan to sell liquor at over-ceiling prices in an apparently legitimate fashion. The core of the scheme was the arrangement by which the whiskey would clear to tavern owners through Francisco, a legitimate wholesaler. The evidence as to both Feigenbaum and Blumenthal shows that each of them knew that the whiskey was coming in, knew that it would be cleared through Francisco, knew that Francisco was to receive $24.50 per case, and knew that Francisco would give the buyers invoices for the whiskey. Each of them therefore knew of the pre-arranged plan, the conspiracy, between the owner of the whiskey and Francisco, to give the black-market sales the appearance of legitimacy. Each of them thus adopted and furthered a known conspiracy. Each of them was therefore properly treated as a co-conspirator, whether he knew of the con-

spiracy at the moment of its inception or acquired that knowledge when he participated therein, whether he did or did not know all the other persons who adopted and aided that basic scheme. *Van Riper* v. *United States*, 13 F. 2d 961, 967 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702; *Baker* v. *United States*, 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *United States* v. *Feinberg*, 123 F. 2d 425, 427 (C. C. A. 7), certiorari denied, 315 U. S. 801.

It is unimportant that the salesmen may not have known each other. They obviously knew that the elaborate arrangements, of which, as we have shown, they were informed, were not made for the purpose of selling the several hundred cases which each of them sold. Each of them, therefore, knew that he was merely one agent to effectuate a broad illegal scheme in which others were also involved. When, in his own interest, each of them did adopt and further that scheme, he became a party to the conspiracy with the others, and became liable for their acts. Salesmen have consistently been held responsible for their contribution to the perpetration of an illegal scheme in which they know other salesmen are employed, even though their actual participation was limited to their selling activities. *Blue* v. *United States*, 138 F. 2d 351 (C. C. A. 6), certiorari denied, 322 U. S. 736; *United States*

v. *Beck*, 118 F. 2d 178 (C. C. A. 7), certiorari denied, 313 U. S. 587. Since each salesman, by making sales under the circumstances indicated, necessarily joined a known conspiracy, he was properly treated as a co-conspirator with the others.

C. *The function of the appellate court in relation to the evidence.*—In cases such as this, where the determination of guilt depends upon the drawing of inferences from the circumstances proved, it has become almost routine for convicted defendants seeking appellate review of the sufficiency of the evidence to urge that circumstantial evidence is insufficient if the circumstances proved are as consistent with innocence as with guilt. The ghost of that contention in relation to the functions of appellate courts has, we think, been finally laid by the exhaustive discussion thereof in *Curley* v. *United States*, 160 F. 2d 229 (App. D. C.), certiorari denied, Nos. 1211 and 1235, O. T. 1946, June 2, 1947. As that opinion points out, the principle that an acquittal must be had if the circumstances are as consistent with innocence as with guilt, is essentially a rule for the jury, and not for the appellate court.[8] It hardly needs to be iterated now that, in reviewing the sufficiency of the evidence to support a conviction, the function of an appellate court is not to reach an independent determina-

[8] The judge did give such an instruction to the jury (R. 443).

tion of guilt or innocence, but to decide merely whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251–252; *Stilson* v. *United States*, 250 U. S. 583, 588–589; *Abrams* v. *United States*, 250 U. S. 616, 619.

At most, the doctrine relied upon by petitioners means no more than that the evidence must be considered insufficient if, taken in the light most favorable to the Government and with all possible inferences drawn in favor of the Government, it is still as consistent with innocence as with guilt. It does not mean that where the inferences that can reasonably be drawn from the Government's evidence may establish guilt beyond a reasonable doubt, the verdict must be reversed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation of defendant's conduct. It is the function of the jury, and not of an appellate court, to draw inferences from the evidence. It is for the jury to determine whether the inferences which reasonably can be drawn from the circumstances proved are sufficient to establish guilt beyond a reasonable doubt. *Yoffe* v. *United States*, 153 F.

2d 570, 573 (C. C. A. 1); *United States* v. *Valenti*, 134 F. 2d 362, 364 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Brandenburg*, 155 F. 2d 110, 112 (C. C. A. 3); *Roberts* v. *United States*, 151 F. 2d 664, 665 (C. C. A. 5); *Blalack* v. *United States*, 154 F. 2d 591, 594 (C. C. A. 6), certiorari denied, 329 U. S. 738; *United States* v. *Levy*, 138 F. 2d 429, 430–431 (C. C. A. 7), certiorari denied, 321 U. S. 770; *Scott* v. *United States*, 145 F. 2d 405, 408 (C. C. A. 10), certiorari denied, 323 U. S. 801.

Here a jury had before it substantial evidence from which, in the exercise of its right to draw inferences from the evidence, it could reasonably conclude that there was a single, integrated conspiracy to sell liquor at over-ceiling prices in a manner having the appearance of legitimacy, and that each of the petitioners knowingly entered into or adopted such conspiracy and furthered it by his own acts. There was therefore ample evidence to support the verdict.

II

SINCE THE EVIDENCE ESTABLISHES A SINGLE CONSPIRACY, THE COURT PROPERLY ADMITTED THE EVIDENCE OF THE ACTS OF EACH PETITIONER AGAINST THE OTHERS AND ALLOWED THE JURY TO CONSIDER SUCH EVIDENCE AGAINST ALL

Petitioners' objections to the court's ultimate ruling, allowing all the testimony adduced by the Government, other than the admissions of Goldsmith and Weiss, to be considered by the jury against all the defendants, is based upon their

contention that the evidence fails to establish a single conspiracy. Since, as we have shown, the evidence does in fact support the jury's finding that there was a single conspiracy as charged in the indictment, petitioners' arguments fall with their premise.

There remains to be considered the mechanics by which the testimony was admitted in evidence against all. As noted in the Statement, *supra*, pp. 13–14, the judge, after first receiving the Government's proof generally, decided to admit it only against the person to whom it directly related, reserving to the Government the right later to move to have it admitted against all the defendants. At the close of the trial, he admitted against all the defendants all the testimony except the admissions of Goldsmith and Weiss.

The reason behind the judge's procedural ruling is evident. Where the existence of a conspiracy must be proved by a collocation of circumstances, it is manifestly impossible to get all the evidence in at the same time. And when the circumstances from which the conspiracy must be inferred consist, as here, in part of the acts of the various defendants, the proof which tends to show the existence of a conspiracy will at the same time tend to show the participation of a particular defendant in the conspiracy. As a result, all the Government's evidence may have to be adduced before the judge can conclude that a jury would be justified in finding the fact of

conspiracy. He cannot know at the outset whether the Government's evidence relating to conduct by the various defendants will or will not establish a conspiracy, and whether it will or will not tend to show the participation of a particular defendant in that conspiracy. Faced with that practical difficulty, a judge has two alternatives. He may at the outset allow proof of the acts of each of the parties in evidence against all, subject to having it stricken out if the connection to the conspiracy is not shown, or he may allow it in evidence only against the person to whom it relates, subject to having it admitted against the others when sufficient proof has been adduced to justify the inference that a conspiracy did exist.

It is the more common practice to follow the first of these alternatives, and the judge here did follow that procedure in the beginning. It soon became apparent, however, that such a procedure would result in undue delay of the trial since each attorney for each defendant felt called upon to object to every item of the Government's proof. The early part of the trial record reveals almost as much space taken up with objections by counsel as with the testimony of witnesses.* As a result, the judge adopted the alternative method and stated that he would allow the evidence to be admitted at first only against the party to whom

*Testimony appears at R. 243–246, 248–249, 250–251; objections at R. 246–248, 249, 251.

it related, reserving to the Government the right later to offer it in evidence against all (R. 254–255).

We cannot see that petitioners are in a position to complain because one method was followed rather than the other. Either method is merely an accommodation of legal principles to the practical difficulty that a jury cannot hear ten witnesses at the same time, and that one witness will often testify to facts which tend to establish, not only the existence of a conspiracy, but the participation of an individual defendant therein. As the Court of Appeals for the District of Columbia said in *McDonald* v. *United States,* 133 F. 2d 23:

> * * * The logical sequence of events —from agreement in a common purpose to perpetration of an act designed to carry it out—does not require that introduction of the evidence must follow the same rigorous sequence. In fact, commission of the overt act may constitute the best proof of the conspiracy and such evidence is often used for that purpose.

The order of proof and its admission in cases of this character is a matter for the discretion of the trial judge. *Hoeppel* v. *United States,* 85 F. 2d 237, 242 (App. D. C.); cf. *Delaney* v. *United States,* 263 U. S. 586, 590. The method adopted here in no way prejudiced petitioners. They were forewarned by the judge's ruling that, if the Government's proof did tend to establish a conspiracy, the evidence offered against one would

be admitted against the others. They thus knew that the testimony of each witness called by the Government might eventually be offered against each of them. If any one of them desired to cross-examine a witness who did not directly implicate him, he could have done so. In fact, some of the petitioners did upon occasion cross-examine a witness whose testimony was not originally admitted against that petitioner. Feigenbaum's attorney (R. 239) cross-examined the representative of the San Francisco warehouse whose testimony was admitted only against Goldsmith and Weiss (R. 263, see R. 255, 261); Blumenthal's attorney (R. 239) cross-examined Reinburg who dealt with Abel (R. 288, see R. 279) and Cernusco who dealt with an unidentified salesman (R. 307, see R. 305); Weiss, representing himself (R. 239), cross-examined Lombardi who dealt with Blumenthal (R. 361, see R. 353).

The important fact is that in the end enough had been shown to justify submission of all this evidence to the jury in order to enable them to determine whether it was sufficient to establish guilt. Petitioners, who were forewarned of the possibility that the evidence might be admitted against them, were certainly not prejudiced because the judge waited to be convinced that the jury could reasonably conclude that a conspiracy did exist before he would allow the evidence to

go to the jury on this point. If his ultimate conclusion on the right to infer a conspiracy from the proof was correct, and we have shown that it was, then his ultimate ruling on the right of the jury to consider that evidence was also correct.

III

SINCE THE FACTS OTHER THAN THEIR ADMISSIONS TENDED TO PROVE A CONSPIRACY, THERE WAS SUFFICIENT PROOF OF THE CORPUS DELICTI TO JUSTIFY ADMISSION OF THE EXTRA-JUDICIAL STATEMENTS BY GOLDSMITH AND WEISS

The contentions of Goldsmith and Weiss that there was insufficient proof of the *corpus delicti* to justify the admission against them of their extra-judicial statements, has also been answered by our argument in Point I A of this brief, *supra,* pp. 21-30, showing the justification for the jury's conclusion that a conspiracy had been proved. As we there pointed out, the simultaneous action of a number of salesmen before the whiskey had arrived at San Francisco, their knowledge of the method by which the sales were to be handled, the fact that Francisco honored the orders thus taken, all tended to show the existence of a preconceived plan, involving the cooperation of several persons, to sell liquor at over-ceiling prices with the trappings of legality. It may be that, without the admissions by Goldsmith and Weiss, there would be basis for an inference that they were the owners of the whiskey, the arrangers and planners of the whole scheme,

although the facts that they sold at less than ceiling price, and that they had never before handled the brand of whiskey involved tend to negative that inference. Even assuming, however, that without their confessions, their part in the venture might appear to be greater than it was, it is still true that the evidence other than their admissions would tend to show the existence of a corrupt agreement between them and others, to get whiskey to San Francisco and distribute it to tavern owners at over-ceiling prices under cover of false invoices. There was thus independent evidence of the agreement, the *corpus delicti* of the crime charged. *United States* v. *Di Orio*, 150 F. 2d 938, 939 (C. C. A. 3), certiorari denied, 326 U. S. 771; *United States* v. *Kertess*, 139 F. 2d 923, 929 (C. C. A. 2), certiorari denied, 321 U. S. 795.

Petitioners are wrong in their contention that there must be independent evidence, other than the admissions, of the complicity in the conspiracy of the individual defendants who made the admissions. "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." *United States* v. *Di Orio*, *supra*; *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); *Anderson* v. *United States*, 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *United States* v. *Marcus*, 53 Fed.

784, 786 (C. C. S. D. N. Y.), error dismissed, 159 U. S. 259.

But, if such proof were necessary, the evidence that Weiss gave orders to the warehouse, that Goldsmith directed payment of the sight drafts for the whiskey, that all sales cleared through Francisco, that Francisco gave invoices for such sales, that Francisco received less than the ceiling price, and had never before handled the whiskey, all tended to show the participation of these defendants in the conspiracy. In order to render the corroborating evidence sufficient, it is not necessary even that the *corpus delicti* be proved beyond a reasonable doubt. *United States* v. *Di Orio; United States* v. *Kertess, supra.* Certainly it is not necessary that the exact manner of the participation by a defendant be proved in full detail without his admissions.

IV

THE INDICTMENT WAS PROPERLY LAID UNDER SECTION 37 OF THE CRIMINAL CODE

Petitioners contend that a prosecution for conspiracy to violate the Emergency Price Control Act by selling at over-ceiling prices will not lie under Section 37 of the Criminal Code, but must be brought under Sections 4 (a) and 205 (b) of the Emergency Price Control Act, making it an offense for any person to "sell or deliver" or for a person in the course of business to buy any commodity in violation of a price regulation, or to

"offer, solicit, attempt, or agree" to perform such Act. They argue that "agree," as used in Section 4 (a) covers the crime of conspiracy.

Since each of the petitioners was sentenced to less than the maximum fixed by Section 205 (b) of the Emergency Price Control Act, their argument in this respect, even if it were correct, is immaterial. At most, it amounts merely to a contention that the indictment cites the wrong statute, an insubstantial error. Rule 7 (c), F. R. Crim. P.; *United States* v. *Hutcheson,* 312 U. S. 219, 229; *Williams* v. *United States,* 168 U. S. 382, 389. Certainly, petitioners cannot claim prejudice because the prosecution undertook to prove overt acts which it would not have been required to plead if Section 4 (a) of the Emergency Price Control Act covered the crime of conspiracy.

In any event, we think it is clear that the term "agree" as used in Section 4 (a) of the Emergency Price Control Act does not cover the crime of conspiracy. When read in its context, "offer, solicit, attempt, or agree," it seems manifest that "agree" is used in the sense of promise, and was intended to cover the situation of a seller who promises, agrees, to sell, or a buyer for trade or business who promises, agrees, to buy at over-ceiling prices. All the words which precede "agree" relate to acts which can be performed by an individual alone, and since "agree" can, without distorting its meaning, be read to cover in-

dividual action, it should be so construed under the rule of *ejusdem generis*.

Repeals by implication are not favored. *United States* v. *Gilliland*, 312 U. S. 86, 96; *United States* v. *Borden Co.*, 308 U. S. 188, 198. When Congress has desired to make a conspiracy to commit a particular offense punishable under a separate statute, rather than under the general conspiracy clause, it has used apt words for such purpose, such as "conspiracy" or "conspire."[10]

That Congress contemplated that prosecutions for conspiracies would be brought under the general statute, rather than under the Emergency Price Control Act is shown by its amendment of Section 204 (e) of the Act to provide that the

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[10] Section 1 of the Sherman Antitrust Act of July 2, 1890, c. 647, 26 Stat. 209 (15 U. S. C. 1); Section 73 of the Act of August 27, 1894, c. 349, 28 Stat. 570, as amended (15 U. S. C. 8); Section 15 of the Act of March 29, 1933, c. 3, 48 Stat. 11 (38 U. S. C. 715); Section 21 of the Tennessee Valley Authority Act of May 18, 1933, c. 32, 48 Stat. 68 (16 U. S. C. 831t (c)); Section 64 of the Farm Credit Administration Act of June 16, 1933, c. 98, 48 Stat. 269, as amended (12 U. S. C. 1138d (f)); Section 4 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, as amended (50 U. S. C. 34); Title VIII, section 5 of the Act of June 15, 1917, c. 30, 40 Stat. 226 (22 U. S. C. 234); Section 2 (a) of the Anti-Racketeering Act of June 18, 1934, c. 569, 48 Stat. 979 (18 U. S. C. 420a); Section 7 of the National Stolen Property Act, as amended by the Act of August 3, 1939, c. 413, 53 Stat. 1179 (18 U. S. C. 418a); Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895 (50 U. S. C. App. 311); Sections 19, 21, 35, 136, 296 of the Criminal Code (18 U. S. C. 51, 54, 83, 242, 487).

stays of criminal proceedings authorized by that section could be issued in prosecutions brought under Section 37 of the Criminal Code. Section 6 of the Joint Resolution of June 30, 1945, 59 Stat. 306, 308, App., *infra*, pp. 55–58. The conference report on that amendment (H. Rep. No. 827, 79th Cong., 1st sess., pp. 7–8) refers to the decision of the Emergency Court of Appeals in *Taub* v. *Bowles*, 149 F. 2d 817, certiorari denied, 326 U. S. 732, which held that a conspiracy to violate the Act was properly brought under Section 37 but that defendants in such prosecutions could not avail themselves of the remedy afforded by Section 204e. It then goes on to state:

> Section 6 of the conference substitute makes the amendments in such subsection (e) which are necessary to give to persons prosecuted under section 37 of the Criminal Code, on account of alleged conspiracy to violate any such regulation or order, the rights provided by subsection (e) in the case of civil or criminal proceedings brought under section 205 of the act.

Clearly, therefore, Section 4 (*a*) was not intended to constitute a repeal pro tanto of Section 37 of the Criminal Code.

Petitioner Feigenbaum also argues (Pet. 57–59) that a conspiracy to sell at overceiling prices falls within the "concert of action" rule barring prosecution for conspiracy "where the agreement of two persons is necessary for the completion

of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime," *Pinkerton* v. *United States*, 328 U. S. 640, 643. This contention is conclusively answered by the opinion of Judge Dobie in *Old Monastery Co.* v. *United States*, 147 F. 2d 905 (C. C. A. 4), certiorari denied, 326 U. S. 734. As that opinion points out, the doctrine on which petitioner relies would at best apply to an attempt to charge a conspiracy between the buyer and the seller alone (see *United States* v. *Katz*, 271 U. S. 354, 355). Here no buyers were charged with conspiracy.

CONCLUSION

The evidence amply supports the jury's verdict that all the petitioners participated in a single conspiracy to sell liquor at overceiling prices. We therefore respectfully submit that the judgment of the court below should be affirmed.

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APPENDIX

Section 37 of the Criminal Code (18 U. S. C. 88) reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 *et seq.* are:

> SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> SEC. 204. (e) (1) Within thirty days after arraignment, or such additional time as

the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.* The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be appli-

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.

cable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code,* setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.

court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of Section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers]

*Added by sec. 6 of Joint Resolution of June 30, 1946, 59 Stat. 306, 308.

and for not more than one year in all other cases, or to both such fine and imprisonment.

Section 24.4 of the California Alcoholic Beverage Control Act, 2 California, *General Laws* (Deering 1944), Act 3796, provides:

> Records to be kept by retailers of spirits. On-or off-sale distilled spirits licensees shall keep books of accounts in which shall be kept records of all distilled spirits acquired by such licensees, or in lieu thereof shall preserve all original bills and invoices for distilled spirits acquired. Such records shall be in the form prescribed by the board and shall show at all times all purchases of distilled spirits made during the previous two years.

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